Supreme Court U.S.
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ALEXANDER L. STEVAS,
CLERK

84-1631

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVEN WALTER LUCAS,
Petitioner,

vs.

DANIEL INTERNATIONAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE SUPREME COURT OF THE STATE OF MISSOURI

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3888

QUESTIONS PRESENTED

1. Whether the Supreme Court of Missouri violated petitioner's rights secured by the Fourteenth Amendment to the United States Constitution by exceeding the scope of its review power over civil judgments under state law and reversing a judgment on the basis of an alleged error which was not presented to or expressly decided by the trial judge.

2. Whether the Supreme Court of Missouri violated petitioner's rights secured by the Fourteenth Amendment to the United States Constitution by violating its own court rules and reversing a judgment on the basis of instructional error even though the complaining party failed to present any allegation of instructional error at the trial court level.

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PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE SUPREME COURT OF THE STATE OF MISSOURI

Petitioner, Steven Walter Lucas, respectfully requests that a writ of certiorari issue to the Supreme Court of the State of Missouri to review its judgment and opinion issued anent this case on December 18, 1984.

OPINIONS BELOW

The decision of the Supreme Court of Missouri is reported at 682 S.W.2d 820 (Mo. banc 1984), and a copy of its opinion appears in the Appendix hereto. The Supreme Court of Missouri concluded that its holding in another case, *Sanders v. Daniel International Corp.*, controlled the disposition of the case at bar. The *Sanders* case is reported at 682 S.W.2d 803 (Mo. banc 1984). Petitioner's Request for Rehearing was denied without opinion. A copy of the Request for Rehearing and the Order denying same are reprinted herein in the Appendix.

JURISDICTION

Petitioner seeks review of a judgment issued by the Supreme Court of Missouri, entered on December 18, 1984. Petitioner timely raised the federal questions in his Motion for Rehearing, which was denied on January 15, 1985. The federal questions were raised at the first appropriate instance. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1), (2), and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article V, § 5 of the Constitution of Missouri provides the following:

> Section 5. Rules of practice and procedure—duty of supreme court—power of legislature. The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination

of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

3. Section 512.160 Mo.Rev.Stat. provides:

512.160. Questions considered on appeal—disposition by court—damages—executions.—1. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court.

2. No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action.

3. The appellate court shall examine the transcript on appeal and, subject to the provision of subsections 1 and 2, award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, or give such judgment as such court ought to have given, as to the appellate court shall seem agreeable to law. Unless justice requires otherwise the court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears.

4. Upon the affirmance of any judgment or order, or upon the dismissal of any case, the appellate court may award to the respondent such damages not ex-

ceeding ten percent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum of which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court.

5. The appellate court, upon the determination of any case on appeal, may award execution to carry the same into effect, or may remand the case, with the decision, to the trial court from whence the cause came, and such determination shall be carried into execution by such trial court.

4. Rule 70.01 of the Missouri Rules of Civil Procedure provides as follows:

Approval of instructions in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

5. Rules 70.02 (b) and (c) of the Missouri Rules of Civil Procedure provide as follows:

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this

Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

6. Rule 78.07 of the Missouri Rules of Civil Procedure provides as follows:

> In jury tried cases, other than cases tried with an advisory jury, allegations of error to be preserved for appellate review must be included in a motion for a new trial except that questions of jurisdiction over the subject matter, questions as to the sufficiency of the pleadings to state a claim or defense and questions authorized by Rule 72.01 to be presented in motions for judgment need not be included in a motion for new trial. Where definite objections or requests were made during the trial in accordance with Rule 78.09, including specific objections to instructions, a general statement in the motion of any allegations of error based thereon is sufficient. Any specific objections to instructions which were not made at the trial before submission to the jury, must be set forth in the motion for new trial to preserve the error for review. Allegations of error based on matters occurring or becoming known after final submission to court or jury shall be specifically set out.

7. Rule 84.13 (c) of the Missouri Rules of Civil Procedure provides as follows:

> (c) Plain Error may be Considered. Plain errror affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

STATEMENT OF THE CASE

This petition arises from a cause of action for malicious prosecution which was most recently tried to a jury in Pettis County, Missouri, on July 24, 1982. The jury returned a verdict in favor of petitioner in the amount of $200,000.00 actual damages and $750,000.00 punitive damages. The trial court then granted respondent a remittitur of $450,000.00 with respect to punitive damages and thereafter entered judgment in favor of petitioner in the amount of $500,000.00.

In the trial of the case, the jury was given thirteen instructions, three of which are relevant to this petition and are as follows:

INSTRUCTION NO. 5

The term "malicious" or "maliciously" as used in these instructions does not mean hatred, spite, or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse.

MAI 16.01

INSTRUCTION NO. 7

Your verdict must be for plaintiff if you believe:

First, defendant instigated a judicial proceeding against plaintiff which terminated in favor of plaintiff, and

Second, in so doing defendant acted maliciously and without reasonable grounds, and

Third, plaintiff was hereby damaged,

unless you believe that plaintiff is not entitled to recover by reason of Instruction No. 9.

MAI 23.07

INSTRUCTION NO. 11

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction No. 7 was willful, wanton, or malicious, then in addition to any damages to which you find plaintiff entitled under Instruction No. 10 you may award plaintiff an additional amount as punitive damages in such sums as you believe will serve to punish defendant and to deter it and others from like conduct.

MAI 10.01

All three of these instructions are "form jury instructions" approved and adopted by the Missouri Supreme Court, en banc, by order dated May 12, 1981. With respect to jury instructions, Missouri operates under a form instruction system wherein the Missouri Supreme Court adopts and approves jury instructions, the use of which is mandatory. Rule 70.01 of the Missouri Rules of Civil Procedure provides as follows:

> Approval of instruction in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

The court-approved instructions are published through the West Publishing Company of St. Paul, Minnesota, in a book entitled *Missouri-Approved Instructions*. In a malicious prosecution lawsuit, a plaintiff is required to use, among others, MAI 23.07 for its verdict directing instruction, MAI 10.01 for its punitive damage submission, and MAI 16.01 for the definition of the term "malicious or maliciously". Petitioner in this case used the required instructions and thus complied with Rules in effect at the time his malicious prosecution action was tried.

The respondent Daniel International Corporation appealed to the Missouri Court of Appeals, Western District. Neither during the trial, nor in its motion for a new trial, nor on appeal did respondent ever make an allegation of error concerning the trial judge's giving of the three instructions.

Before any action was taken by the Court of Appeals, this case was transferred to the Supreme Court of Missouri because another malicious prosecution case involving similar facts was already pending before the Court, although the two cases were never consolidated.

On December 18, 1984, the Supreme Court of Missouri reversed and remanded petitioner's cause of action relying on the case of *Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo. banc 1984), decided the same day. The *Sanders* decision held that the court-appointed MAI instruction which defined the terms "malicious" or "maliciously" should no longer be used in malicious prosecution cases. On January 2, 1985, petitioner moved for rehearing, alleging that the Supreme Court's reliance on the *Sanders* decision deprived him of due process and equal protection under the United States Constitution because the allegation of error determinative in *Sanders* was

never raised nor preserved in petitioner's case. Petitioner's motion for rehearing was denied on January 15, 1985.

REASONS FOR GRANTING THE WRIT

The issue presented in this petition is whether the Supreme Court of the State of Missouri, by arbitrarily choosing to ignore the preservation requirement for appellate review under state law, violated petitioner's rights secured by the Fourteenth Amendment to the United States Constitution.

As a threshold question, petitioner must establish that he has been deprived of life, liberty or property to invoke the due process clause. However, this Court has often stated that property protected by the Fourteenth Amendment is not limited to the traditional notions of tangible objects, but extends through many different types of rights. The recent case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) reviews the various kinds of interests which this Court has held to be property. In *Logan* the Court held that due process clauses "protect civil litigants who seek recourse in the courts," *Id.* at 429, and further held that a plaintiff's right to pursue a cause of action was a property right protected by the Fourteenth Amendment. Petitioner's case is even more compelling than that of the plaintiff in *Logan* in that petitioner has not lost a nebulous right to pursue a cause of action, but has lost a judgment of easily determinable value.

Petitioner comes to this Court because he has not been afforded the procedural due process which the Fourteenth Amendment requires. The right of appeal in Missouri courts is purely a matter of legislative grace. Al-

though Article V, Section 5 of the Missouri Constitution grants the Missouri Supreme Court rule-making authority, that section also prohibits any rule from changing the right of appeal. The right of appeal should not be viewed as simply a one-sided procedure existing only for benefit of an appellant, but rather is a statement of rights for both sides, also outlining for any respondent his rights and protections for a judgment entered on his behalf. Section 512.160.2 requires that aside from sufficiency and jurisdictional questions, allegations of error must have been presented at the trial level in order to be considered by Missouri appellate courts. In the instant case, the respondent not only failed to present the allegation of error to the trial court, respondent also failed to present the allegation of error to any appellate court.

Aside from ignoring the statutory confines on its scope of review in civil cases, the Missouri Court also ignored the restraints self-imposed by its own Rules. Rule 78.07 of the Missouri Rules of Civil Procedure requires that for an allegation of error concerning jury instructions to be preserved for appellate review, the allegation must be made either at trial before submission to the jury or in the motion for new trial. Yet, neither at trial, nor in its motion for new trial, nor in any brief on appeal did respondent ever complain that the jury instructions misstated the definition of malice. Because the allegation of error was never preserved, petitioner received no notice of its materiality on appeal; because the allegation was never presented to an appellate court, petitioner received no hearing.

The process denied petitioner is no mere formality. The adversarial system is the cornerstone of American jurisprudence. When an appellate court is allowed to reverse a judgment on grounds neither preserved nor pre-

sented, the judiciary no longer serves as an arbiter of disputes but arbitrarily usurps the role of the legislature.

A case nearly analogous to petitioner's is *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*, the Supreme Court of Missouri reversed the trial court's decision on grounds which had not been briefed or argued. *Id.* at 677. This Court ruled that the effect of the Missouri Supreme Court's decision was to deprive that petitioner of an opportunity to preserve his claim and held that due process had been violated in extremis.

An older case dealing with the process as it applies to the judiciary is *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912). In *Standard Oil*, the Supreme Court of Missouri in a quo warranto proceeding assessed both the penalty of ouster and a fine. The petitioner Standard Oil challenged the ability of the court to levy a fine, arguing that it was not on notice that a fine could be levied. Although eventually holding that both the fine and the ouster were proper, this Court discussed the basic elements of due process and stated:

> Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

Id. at 281.

The petitioner's case is precisely within the principles set forth. The petitioner was given notice and hearing on one set of issues and was deprived of its judgment on another. The hearing given him was worthless insofar as his ability to protect his verdict. Furthermore, and even more critical, statutory law as well as court rule prohibited the Supreme Court of Missouri from considering and reversing the petitioner's judgment on the grounds asserted in its opinion.

By choosing to ignore the preservation requirement when it suits its purpose, the Missouri court sets itself above the rule of law leaving litigants at the whim of the court with seemingly no recourse. The judiciary serves as a check and balance on unwarranted expansions or abuse of power by the legislative and executive branches of government. However, just as important, but institutionally more difficult, is that the judiciary also police itself. The preservation requirement as a prerequisite to appellate review is an obvious limitation on the power of appellate courts. The typical bureaucratic response, if unchecked, is to "exception" such a limitation out of existence. However, the ultimate result of such a response is a situation like petitioner's: a judgment is reversed on an allegation of error which was neither presented at trial, nor in the motion for new trial, nor in brief on appeal, nor in oral argument; the final irony is that the so-called error was contained in a jury instruction which the petitioner was required to give by mandate of the very court which later finds error.

In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court held that the right of appeal cannot be handled arbitrarily or capriciously without violating the Fourteenth Amendment. While petitioner recognizes that his individual plight may not be a concern of this Court, petitioner nevertheless

believes that the facts in this case present a clear example of a "judiciary out of control" and an opportunity for this Court to remind inferior courts throughout our nation that the power to ignore the law should not be confused with the power to interpret the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing were mailed, postage prepaid, this 15th day of April, 1985, to:

Kelly Pool
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235 East High Street
P. O. Box 1069
Jefferson City, Missouri 65102

RICHARD G. CALLAHAN
Attorney for Petitioner

APPENDIX

APPENDIX A

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

Appeal From the Circuit Court of Pettis County
Honorable Donald L. Barnes, Judge

Respondent, Steven Walter Lucas, brought this suit for malicious prosecution against appellant Daniel International Corporation in the Circuit Court of Callaway County. The cause initially was tried in Cole County on a change of venue. The jury returned a verdict for respondent, awarding him $250,000 in actual damages and $200,000 in punitive damages. The trial court sustained a motion for a new trial, apparently on the ground that the verdict was so grossly excessive as to indicate bias, passion and prejudice. The case was retried in the Circuit Court of Pettis County and the jury returned a verdict for respondent in the sum of $200,000 in actual damages and $750,000 punitive damages. The trial court granted a remittitur of $450,000 on the ground that the punitive dam-

age award was excessive and against the weight of the evidence. Appellant thereupon appealed to the Court of Appeals, Western District, and respondent cross-appealed. Pursuant to Rule 83.06, the Western District recommended transfer prior to opinion in light of our taking transfer in Sanders v. Daniel International Corp., ... S.W.2d ..... (Mo. banc 1984) [No. 65529, decided December 18, 1984], decided herewith. We reverse and remand.

The facts surrounding the criminal prosecution from which the case arises are identical in all relevant respects to those in *Sanders*. Reference should be made to that case for a complete statement of the circumstances prompting this litigation. For our purposes, it is sufficient to note that respondent herein was one of seven persons charged on the basis of a complaint signed by appellant's agents, with the misdemeanor of attempted theft of tools and gauges valued at over fifty dollars. The prosecutor later dismissed the charges.

Appellant has raised several points on appeal, but we need not address these questions because we conclude our holding in Sanders v. Daniel International Corp., *supra*, controls the disposition of this appeal. In *Sanders*, we held that a plaintiff suing on a theory of malicious prosecution must prove that the defendant initiated the prosecution "primarily for a purpose other than that of bringing an offender to justice." *Sanders, supra,* at ..... [slip op. at 22], *quoting* Restatement (Second) of Torts § 668 (1965). In addition, we held that to qualify for punitive damages in a malicious prosecution action, a plaintiff must prove that the defendant acted out of actual malice, i.e., that his conduct was "prompted or accompanied by ill will, or spite, or grudge, . . ." *Sanders, supra,* at ..... [slip op. at 28-29], *quoting* E. Devitt & C. Blackmar, 3 Federal Practice and Instructions 85.11, at 121 (3rd ed. 1977).

The judgment is reversed and remanded for retrial consistent with our opinion in *Sanders*, *supra*, at ..... [slip op. at 27].

.....

Warren D. Welliver, Judge

Higgins, Billings and Donelly, JJ., concur; Blackmar, J. concurs in result in separate opinion filed; Rendlen, C.J., dissents in separate opinion filed; Gunn, J. dissents in separate opinion filed.

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

OPINION CONCURRING IN RESULT

I agree that the judgment should be reversed and the case remanded for new trial for the reasons stated in my Opinion Concurring in Result in Sanders v. Daniel International Corporation, No. 65529, handed down today.

.....

Charles B. Blackmar, Judge

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI

EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

DISSENTING OPINION

I respectfully dissent and would reverse the judgment of the trial court for the reasons set forth in the dissenting opinion of Judge Gunn. Again however, as in the Sanders v. Daniel International Corp. ..... S.W.2d ..... (No. 65529 Mo. banc December 18, 1984), I endorse the suggested jury instruction forms set forth in the separate opinion of Judge Blackmar by which he concurs in result in that case.

.....

Albert L. Rendlen, Chief Justice

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

DISSENTING OPINION

For the reasons stated in my dissenting opinion in Sanders v. Daniel International Corporation, ... S.W.2d ..... (No. 65529 Mo. banc December 18, 1984), I dissent from the majority opinion here. The record appears desolate of evidence of any malice by defendant.

.....
George F. Gunn, Jr., Judge

APPENDIX B

(Filed January 2, 1985)

IN THE SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

MOTION FOR REHEARING

Comes now plaintiff-respondent Steven W. Lucas and moves the court for rehearing in the above case for the reason that the court in its opinion of December 18, 1984, overlooked and failed to address the issue of whether it has the authority to apply the rationale set forth in *Sanders v. Daniel International Corporation*, ... S.W.2d ..... (Mo. banc 1984) [No. 65529, decided December 18, 1984] to the appeal in this case because defendant failed to raise "malice" as an issue before any court; or, alternatively, whether the new rules announced in *Sanders* should be applied retroactively to trials occurring before the date of the *Sanders* decision.

I.

1. The court in its opinion of December 18, 1984, overlooked and failed to address the fact that neither at trial, nor in its motion for a new trial, nor in any brief on appeal, did defendant ever raise in this case the issue

that the MAI definition of "malice" misstated Missouri law or that the Missouri definition of "malice" should be changed.

2. The right of appeal in civil actions is solely a matter of legislative grace; Article V, section 5 of the Missouri Constitution prohibits this court from otherwise expanding or contracting that right of appeal. The legislature has defined the scope of appeal in civil cases in subsections 1 and 2 of section 512.160 RSMo.

3. Subsection 1 of section 512.160 requires that an allegation of error must be presented to or expressly decided by the trial court in order to be considered on appeal. Because defendant never raised the issue of whether the MAI definition of "malice" misstated Missouri law or whether the Missouri definition of "malice" should be changed, the *Sanders* rationale is not dispositive of the appeal in this case under the authority of this subsection.

4. The alternate basis for appellate review, subsection 2 of section 512.160, requires error on the part of the trial court. Supreme Court Rule 70.02 mandates the giving of the MAI definition of "malice" to the exclusion of any other definition; consequently, the trial court can hardly be said to have committed error in the giving of the required definition when any failure to give the MAI definition already has been declared by this court to be error. Rule 70.02(c).

5. The court's opinion reversing the judgment rendered in favor of plaintiff because of the *Sanders* rationale thus exceeds the court's authority under section 512.160 and Articles II and III of the Missouri Constitution; furthermore, by granting this defendant a broader appellate review than that created by the legislature, by ignoring constitutional and legislative restraints on the court's reviewing authority, and by treating plaintiff differently

from other respondents similarly situated, the court has violated plaintiff's rights to due process, equal protection, and a jury trial secured under both the Missouri and United States Constitutions.

II.

6. The court in its opinion of December 18, 1984, overlooked and failed to address the question of whether the new law announced in *Sanders* is to be applied retroactively to cases tried prior to the date of the decision or whether the decision is to be applied prospectively only. Implicit in the decision in this case is a holding that the *Sanders* rule is to be applied retroactively, even though a retroactive application is inconsistent with this court's practices, conflicts with prior decisions, and works an injustice on litigants required to follow pattern instructions promulgated by this court.

WHEREFORE, plaintiff-respondent respectfully requests that the court grant plaintiff-respondent a rehearing.

Respectfully submitted,

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CLERK OF THE SUPREME COURT
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January 15, 1985

Mr. Richard G. Callahan
109 East High
Jefferson City, Missouri 65101

In re: Steven Walter Lucas vs. Daniel International Corporation, No. 65793

Dear Mr. Callahan:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Plff.-Resp.-Cross-App.'s motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: Mr. John E. Burruss, Jr.